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NO. 07-582

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ACADEMY OF PEDIATRICS, BENTON FOUNDATION, CHILDREN NOW, NATIONAL INSTITUTE ON MEDIA AND THE FAMILY, PARENT TEACHER ASSOCIATION, AND UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATIONS, INC., IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI*

Amici are non-profit organizations that share a strong interest in ensuring that broadcast television fulfills its potential of providing educational programming to children and that children are not exposed to programming that is not appropriate for them.[1]

Amicus the American Academy of Pediatrics ("AAP") is an organization of 60,000 primary care pediatricians, pediatric medical subspecialists and pediatric surgical specialists dedicated to the health, safety and well-being of infants, children, adolescents and young adults.

The mission of *amicus* the Benton Foundation is to articulate a public interest vision for the digital age and to demonstrate the value of communications for solving social problems. The Foundation is a long-time advocate of defining the public interest obligations of digital broadcasters.

Amicus Children Now is a national organization for people who care about children and want to ensure that they are the top public policy priority. Its Children & the Media Program works to provide a healthy media environment for all children.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amicus the National Institute on Media and the Family ("NIMF") is a non-profit, non-denominational and non-partisan organization with the mission to maximize the benefits and minimize the harm that media have on children's health and development through research and education. NIMF believes that it is in the interest of parents, children and the general public to uphold the public interest obligations of broadcasters.

Amicus the Parent Teacher Association ("PTA"), a non-profit organization, is the largest volunteer child advocacy organization in the United States. PTA comprises more than 5 million members in 25,000 local, council, district, and state PTAs in the 50 states, the District of Columbia, the U.S. Virgin Islands, and Department of Defense Dependents Schools overseas. Founded in 1897, PTA's mission is to support and speak on behalf of children and youth in the schools, in the community and before governmental bodies and other organizations that make decisions affecting children. PTA has supported numerous legislative and regulatory initiatives, court cases and media industry campaigns supporting the care and protection of children. PTA is committed to educating families, especially parents, caregivers, and children, to be successful and knowledgeable media consumers.

Amicus the United Church of Christ, Office of Communications, Inc. ("UCC OC, Inc."), is the media justice arm of the United Church of Christ ("UCC"). UCC is a faith community rooted in justice with 5,700 local congregations across the United States. It was formed by the 1957 union of the

Congregational Christian Churches and the Evangelical and Reformed Church. UCC OC, Inc. has long recognized the unique power of the media to shape public understanding and thus society. For this reason, UCC OC, Inc. works to create just and equitable media structures that give meaningful voice to diverse peoples, cultures and ideas.

SUMMARY OF ARGUMENT

This Court granted certiorari in this case to address whether the court of appeals erred in striking down the FCC's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. § 1464; *see* 47 C.F.R. § 73.3999, when the expletives are isolated, or "fleeting," and not repeated.

Amici file this brief in support of neither side, but to advise the Court as to the concerns of the children's media policy community and to share our knowledge of certain facts that may be relevant in this case.

Of great importance to *Amici* is that, whatever the outcome in this case, the Court continues to recognize the constitutional legitimacy of the FCC's statutory public interest oversight of television broadcasters. The Court need not, and should not, revisit *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), to address the narrow issue before it. *Amici*, as organizations committed to upholding the public interest obligations of broadcasters, especially as they apply to promoting mentally healthy children and families, have an interest in upholding the

stability and predictability of these established aspects of broadcast media law.

Amici are particularly concerned because the court of appeals stated, albeit in *dicta*, that "technological advances may obviate the constitutional legitimacy of the FCC's robust oversight." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 466 (2d Cir. 2007). Accordingly, *Amici*'s brief also corrects the apparent misimpression by the court of appeals regarding the ability of "technological advances" to displace the FCC's public interest oversight function in broadcast television. The V-Chip and its companion program ratings system, despite their ostensible promise, have not been designed or implemented in a way to address successfully the challenge of protecting children from viewing material their parents feel is inappropriate on broadcast television.

ARGUMENT

I. THE COURT NEED NOT AND SHOULD NOT RECONSIDER *RED LION.*

Amici urge the Court to decide this case based on whether the court of appeals correctly held that the FCC's determination violated the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* ("APA"), and not, as one respondent has suggested, on the broader constitutional issues that the court of appeals discussed in *dicta*. *See, e.g.*, Brief in Opposition of NBC Universal Inc. and NBC Telemundo License Co. at 32 n.9 (arguing that to the extent the FCC argues that the scarcity rationale dictates a more permissive standard of review for regulating broadcast speech, the Court may need to reconsider its decision in *Red*

Lion). Accepting respondent's invitation to reconsider *Red Lion* is not only unnecessary, but could have the unintended consequence of harming children by undermining the constitutional basis of the Children's Television Act of 1990 ("CTA")[2] and other federal statues and regulations designed to ensure that children have access to quality educational programs designed specifically for them.

In *Red Lion,* this Court unanimously observed that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish," 395 U.S. at 388, and "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." *Id.* at 389. Thus, while recognizing that the First Amendment applied to broadcasting, the Court explained:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social,*

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[2] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 394 (2000)).

> *political, esthetic, moral, and other ideas and experiences which is crucial here.*

Id. at 390 (emphasis added).[3]

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[3] Those who attack *Red Lion*'s scarcity rationale generally make three arguments. First, they assert that there are more broadcast stations today than in 1969, and new technologies, such as cable television and the Internet, also provide a vast array of content outlets. This argument misapprehends what the *Red Lion* Court meant by scarcity. The Court was referring not to the scarcity of broadcast stations, but rather to the scarcity of the electromagnetic spectrum, and the fact that more people wanted to use it than could be accommodated. That remains true today. As but one example that the demand for spectrum continues to far exceed supply, the FCC's recent auction of wireless service spectrum brought in close to 20 billion dollars. *See* Public Notice, FCC, "Auction of 700 MHz Band Licenses Closes – Winning Bidders Announced for Auction 73," 23 FCC Rcd. 4572 (2008).

Second, *Red Lion* critics argue that, even if spectrum was once scarce, it no longer is because technological advances allow the more efficient use of spectrum. While it is true that technological developments have allowed spectrum to be used more efficiently, *Red Lion*'s observation that "uses for that spectrum have also grown apace," 395 U.S. at 396, remains equally true. Today, with wi-fi, cellphones and other non-broadcast wireless services being used to access the Internet and to communicate in other ways, demand for spectrum is now greater than ever.

Finally, some *Red Lion* critics argue that spectrum is no different than any other economic good, and since all economic goods are scarce, there is no justification for treating broadcasting differently than other media. But those critics ignore that spectrum is not like most other economic goods. It is instead a public good that by law belongs to the United States, not the broadcaster, 47 U.S.C. §§ 301, 304. "A licensed broadcaster is 'granted the free and exclusive use of

(Cont'd.)

A. The FCC's Children's Television Policy Is Premised In Large Part on *Red Lion*.

The FCC has recognized that children are an important segment of the community entitled to service from broadcast stations since at least 1960, *see Report and Statement of Policy Re: Commission Policy on Programming*, 20 R.R. (P & F) 1901 (1960), and in 1974 formalized and expanded its children's television policy in *Children's Television Report and Policy Statement*, 50 F.C.C. 2d 1 (1974), *aff'd sub nom. Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir 1977). There, the FCC noted that the "landmark decision" in *Red Lion* made plain that "'the Commission is not powerless to insist that [broadcasters] give adequate . . . attention to public issues.'" *Id.* at 4-5 (quoting *Red Lion*, 395 U.S. at 393).

> While the holding of the *Red Lion* case was limited to the fairness doctrine, the Court's opinion has a significance which reaches far beyond the category of programming dealing with public issues. . . . . [*Red Lion*'s] language,

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(Cont'd.)

a . . . valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quotations omitted). On behalf of the public, the government is entitled to demand that, in return for the profit-making opportunity bestowed on a broadcaster by a license, the broadcaster be required to provide compensation to the public in the form of obligations designed to "assure that an important [public] resource – the airwaves – will be used in the public interest." *Id.* at 397.

> in our judgment, clearly points to a wide range of programming responsibilities on the part of the broadcaster.

Id. (citations omitted). The FCC concluded that "because of their immaturity and their special needs, children require programming designed specifically for them," and thus it expected "television broadcasters, as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience." *Id.*

In 1990, Congress codified broadcasters' special obligation to serve children by enacting the CTA. Congress found that "it has been clearly demonstrated that television can assist children to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them," and that "as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children." CTA § 101, 47 U.S.C. § 303a note. The CTA thus requires that, in reviewing the license renewal application of any commercial or noncommercial television licensee, the FCC shall "consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs." 47 U.S.C. § 303b(a)(2).

The CTA's legislative history states that its objective is "to increase the amount of educational and informational broadcast television programming available to children." S. Rep. No. 227, 101st Cong.,

1st Sess. at 1 (1989). Both the Senate and House Reports closely examined the constitutionality of imposing an affirmative obligation on licensees to serve the special needs of children. *Id.* at 10-16. H.R. Rep. No. 385, 101st Cong., 1st Sess. at 8-12, (1989), *reprinted in* 1990 U.S.C.C.A.N. 1606, 1612-1616 ("1989 House Report"). The House Committee concluded that requiring the FCC to consider children's programming when renewing licenses was "clearly constitutional under tests established in *Red Lion* and subsequent cases." *Id.* at 11. The Senate Committee likewise concluded that "it is well within the First Amendment strictures to require the FCC to consider, during the license renewal process, whether a television licensee has provided programming specifically designed to serve the educational and informational needs of children in the context of its overall programming." S. Rep. No. 101-227 at 16. The Senate Report observed that in *Red Lion*, "the Supreme Court affirmed that because radio spectrum is not available to all, broadcast licensees have a duty to act as fiduciaries for the public. A fundamental part of that duty is the obligation to serve children, who constitute a unique segment of the television audience." *Id.* at 11 (citation omitted). The Senate Committee further observed that those "attacking the scarcity basis of *Red Lion* [are] arguing that the entire broadcast regulatory scheme in Title III [of the Communications Act of 1934] is unconstitutional . . . . We have shown that this drastic overturning of four decades of Supreme Court precedents i[s] wholly unfounded." *Id.* at 14.

This Court has recognized that Congress' determinations on issues of this nature are entitled

to deference. As the Court has observed, "when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem." *CBS v. Democratic Nat'l Committee*, 412 U.S. 94, 103 (1973).

Overlaying the CTA are the FCC's rules implementing the CTA, which themselves are likewise based on *Red Lion* and its allied precedent. In 1996, the FCC concluded that its initial CTA regulations had not been fully effective in meeting Congressional intent to increase the amount of educational and informational programming for children. *Policies and Rules Concerning Children's Television Programming*, Report and Order, 11 FCC Rcd. 10660, 10661 (1996) ("*1996 Order*"). Among other things, the FCC decided to adopt processing guidelines under which television stations that aired three hours per week of programming designed to educate children at times when children were likely to be watching, would receive staff-level approval of the CTA portion of their license renewal application. *Id.* at 10662-63.

The FCC also addressed broadcasters' arguments that these quantitative guidelines violated the First Amendment. *Id.* at 10728-33. After analyzing Supreme Court precedents such as *Red Lion* and *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), the FCC concluded that the guidelines implementing the CTA were constitutional. It also noted that the D.C. Circuit had recently found constitutional a ban against airing indecent material when children were likely to be viewing. *1996 Order*, 11 FCC Rcd. at

10731 (citing *Action for Children's Television v. FCC*, 825 F.2d 1332 (D.C. Cir. 1988)). The FCC observed that if Congress could constitutionally regulate indecent speech on the assumption that indecent material is harmful to children, "it should follow that the Commission's adoption of less restrictive measures to encourage the airing of material beneficial to children is consistent with the First Amendment." *Id.*

In 2004, the FCC considered how the CTA obligations of television broadcast licensees should apply to digital television ("DTV") broadcasters. *Children's Television Obligations of Digital Television Broadcasters*, Report and Order, 19 FCC Rcd. 22943 (2004). The FCC amended the processing guidelines so that DTV "broadcasters that choose to provide additional channels or hours of free video programming [above and beyond] their required free over-the-air video program service [would] have an increased core [children's] programming benchmark roughly proportional to the additional amount of free video programming they ch[ose] to provide." *Id.* at 22950. On reconsideration, the FCC rejected the arguments of broadcasters that the revised guidelines violated the First Amendment. *Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd. 11065, 11072-73 (2006). In so doing, the FCC relied on the CTA and the fact that under *Red Lion*, "[i]t is well established that the broadcast media do not enjoy the same level of First Amendment protection as do other media." *Id.* & n.41.

The CTA and the FCC regulations implementing it have succeeded in increasing the amount of children's educational programming. Indeed, the National Association of Broadcasters ("NAB") claims that since the CTA's enactment, there has been a "sea change in the amount, quality and availability of children's programming." Comments of the National Association of Broadcasters at 2, *Children's Television Obligations of Digital Television Broadcasters*, FCC MM Docket No. 00-167 (filed Sept. 4, 2007).

The FCC's own review of the impact of the CTA processing guidelines found that broadcasters aired, on average, approximately four hours of children's programming per week.[4] This represents a doubling of the average of two hours per week of children's programming which NAB claimed that commercial broadcasters were airing at the time the CTA was enacted. *1996 Order*, 11 FCC Rcd. at 10719. Studies confirm that most broadcasters are meeting the three-hour guidelines, and many are exceeding them.[5]

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[4] Mass Media Bureau, FCC, *Three Year Review of the Implementation of the Children's Television Rules and Guidelines 1997-1999* (2001), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-209149A1.pdf.

[5] *See, e.g.*, Kelly L. Schmitt, Annenberg Pub. Policy Ctr. of Univ. of Pa., *The Three-Hour Rule: Is It Living Up To Expectations?* (1999), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/19990628_three_hour_expectations/19990629_three_hour_expectations_report.pdf; Amy B. Jordan, Annenberg Pub. Policy Ctr. of Univ. of Pa., *Is the Three-Hour Rule Living Up to*

(Cont'd.)

Thus, revisiting *Red Lion* (other than to affirm that it remains good law) could unnecessarily raise questions about the constitutionality of the CTA and the FCC's rules implementing it. That, in turn, could result in reductions in the amount of educational programming available to children, thereby increasing the likelihood that they will instead watch programming that may not be appropriate for them.

B. This Court Need Not Risk Disturbing The Children's Television Act Because This Case Does Not Implicate *Red Lion* Or Broadcasters' Public Interest Obligations.

It is not necessary for the Court to reconsider *Red Lion* or *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to resolve the case before it. Although the broadcast networks presented a variety of arguments below, the court of appeals decided the case based only on the grounds that the FCC's change in policy was without adequate explanation and therefore violated the APA. While the court of appeals did discuss the networks' additional constitutional arguments, it did so only in *dicta.* 489 F.3d at 462 n.12. Indeed, the court of appeals explicitly refrained from deciding the case on constitutional grounds, referencing this Court's admonition that a "fundamental and longstanding

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(Cont'd.)

Its Potential? (2000), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/20000626_Three_hour_rule_report/20000626_three_hour_rule_report.pdf.

principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Id.* at 462 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445 (1988)). Even in *dicta,* the court of appeals addressed neither *Red Lion* nor broadcasters' public trustee duties. It merely acknowledged the broadcasters' claim that the grounds for treating broadcast media differently have eroded and, referring to the rationales cited in *Pacifica*, observed "that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." 489 F.3d at 465.

While *Amici* do not believe the Court should disturb *Pacifica*, the rationales underlying *Red Lion* and *Pacifica* are, in any event, distinct. In *Pacifica,* the Court did not rely on the public trustee rationale or scarcity. While recognizing that the reasons for giving broadcasting special treatment were many and complex, it held that *only two* of those reasons were relevant to indecency: (1) that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and (2) that "broadcasting is uniquely accessible to children, even those too young to read." 438 U.S. at 748, 749. Justice Brennan noted that "The opinions of my Brothers Powell and Stevens rightly refrain from relying on the notion of 'spectrum scarcity' to support their result. As Chief Judge Bazelon noted below, 'although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship.'" *Id.* at 770 n.4 (Brennan, J., dissenting) (citation omitted). More recently, in *Denver Area Educ. Telecomm. Consortium v. FCC*,

518 U.S. 727, 748 (1996), which upheld one provision in the Cable Television Consumer Protection and Competition Act of 1992[6] designed to protect children from indecent programming on cable public and leased access channels, the plurality explained that a medium's scarcity "has little to do with a case that involves the effects of television viewing on children."

Therefore, even if this Court should find it necessary to go beyond the APA issue to decide this case, and even if it were inclined to decide the case favorably or unfavorably to petitioners based on *Pacifica*, it need not, and should not, consider issues relating to spectrum scarcity, public trustee obligations of broadcasters, or the continuing validity of *Red Lion*.

II. THE V-CHIP AND THE TV PROGRAM RATINGS SYSTEM ARE NOT AN EFFECTIVE LESS RESTRICTIVE ALTERNATIVE.

Should the Court decide to address the constitutionality of the FCC's actions here, it may need to consider whether less restrictive alternatives are available to protect the well-being of children. While *Amici* believe the Court should not reach that issue, we address it here in case the Court decides to do so.

Congress has recognized that "it is difficult to think of an interest more substantial than the

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[6] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

promotion of the welfare of children."[7] Moreover, the mere existence of a possible alternative means of achieving the government's interest is not enough to find the FCC's action unconstitutional; rather, the alternative must be "*feasible and effective*." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) (emphasis added).

Network broadcasters are likely to argue, as they did below, that the V-Chip and its associated TV program ratings system provide a less restrictive alternative to the indecency rules at issue. In *dicta*, the court of appeals expressed some sympathy, although without citation or analysis, for the broadcasting industry's argument:

> The Networks argue that the advent of the V-chip and parental ratings system similarly provide a less restrictive alternative to the FCC's indecency ban . . . . The FCC's arguments [to the contrary] are not without merit, but they must be evaluated in the context of today's realities . . . . [B]locking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want

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[7] 1989 House Report at 11, *reprinted in* 1990 U.S.C.C.A.N. at 1616. *See also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), § 551(a)(8) (codified at 47 U.S.C. § 303 note) (Congress finds there is a "compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children").

> to see on television . . . . [T]echnological advances may obviate the constitutional legitimacy of the FCC's robust oversight.

Fox Television Stations, 489 F.3d at 466 (footnote omitted).

The V-Chip, however, has not been the technological panacea that the court of appeals was led to believe. It is but one tool, of limited reach, to safeguard children from exposure to programming that their parents believe is inappropriate. For the V-Chip and the TV program ratings system to be an effective less restrictive alternative, certain conditions must be met. First, all television programming must be rated, and the ratings must be consistent and accurate. Second, parents must be aware of the availability of the V-Chip and the TV program ratings system. Third, the V-Chip must be user-friendly for parents. Fourth, all TV sets must be equipped with the proper V-Chip technology. The absence of any of these conditions prevents the V-Chip from functioning as an effective less restrictive alternative.

Amici will briefly review the legislative origin and purpose of the V-Chip before assessing the current state of the four core conditions necessary for the V-Chip's success.

A. As Implemented by the FCC, The Efficacy of the V-Chip Hinges Entirely on Voluntary and Unenforceable Industry Guidelines.

The V-Chip program is a "complicated mix of government regulation and industry self-policing, creating a system that combine[s] mandated

hardware with voluntary software." Kathryn C. Montgomery, *Generation Digital: Politics, Commerce, and Childhood in the Age of the Internet* 44 (2007). The FCC, fulfilling the requirements of Section 551 of the 1996 Act,[8] required that by January 2000, all television sets with screens 13 inches or larger that are shipped in interstate commerce or manufactured in the United States must include "V-Chip" blocking hardware.[9] The 1996 Act also required adoption of a TV program ratings system to work in conjunction with the V-Chip. The V-Chip reads an electronic code, transmitted with the television signal, that identifies a program's rating. By detecting the encoded rating, the V-Chip, when programmed to do so, can block programs based on the rating levels selected beforehand by parents.[10]

Rather than imposing a uniform, mandatory TV program ratings standard on the broadcast, cable and program production industries, Congress permitted those industries to develop a set of TV

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[8] 1996 Act § 551(c), 47 U.S.C. § 303(x) (2000).

[9] *Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings*, Report and Order 13 FCC Rcd. 11248 (1998). Gloria Tristani, counsel to *Amici*, is a former FCC Commissioner (1997-2001) and was Chair of the FCC's V-Chip Task Force (1999-2001) that issued a separate statement to this Report and Order.

[10] *See generally* Patricia Moloney Figliola, *V-Chip and TV Ratings: Monitoring Children's Access to TV Programming* (Cong. Research Serv., CRS Report for Congress Order Code RL32729, Jan. 10, 2005) ("CRS V-Chip Report"); *see also* FCC, "V-Chip: Viewing Television Responsibly," http://www.fcc.gov/vchip (last visited June 5, 2008).

program ratings. NAB, the National Cable Television Association ("NCTA") and the Motion Picture Association of America ("MPAA") jointly created an initial version of the TV Parental Guidelines, which industry first implemented in early 1997.[11] *See Implementation of Section 551 of the Telecommunications Act of 1996, Video Program Ratings*, Report and Order, 13 FCC Rcd. 8232, 8233-34 (1998) ("*FCC 1998 Report and Order*"). Industry also established a TV Parental Guidelines Oversight Monitoring Board ("Board"). 12 FCC Rcd. 3266-67.

Public health organizations, parents groups, public interest groups and members of Congress thereafter expressed concern about the limitations of industry's initial voluntary ratings system because it provided only age-based ratings and did not assess the content of individual programs. *FCC 1998 Report and Order*, 13 FCC Rcd. at 8234. Discussion between industry and certain advocacy groups, including *Amici* AAP, Children Now and PTA, ensued, and their negotiations led to the submission to the FCC of revised guidelines in August 1997, which contained both age-based and program content-based indicators. *Id.* at 8235 n.19. In addition, both sides agreed that membership of the Board would be expanded to include 5 non-industry members (out of 24 members). *Id.* at 8243. The revised guidelines sought to provide a content-based

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[11] *See* Letter from Jack Valenti, President, MPAA., *et al.*, to William F. Caton, Secretary, FCC, submitting TV Parental Guidelines (Jan. 17, 1997), *reprinted as* App. to Public Notice, FCC, "Commission Seeks Comment on Industry Proposal for Rating Video Programming," 12 FCC Rcd. 3260, 3264-73 (1997).

system for rating programs with sexual, violent or other material that parents might consider inappropriate for their children. *Id.* at 8235. Industry committed to voluntarily broadcast signals with these ratings embedded in their programming. *Id.* at 8233. The Guidelines were to apply to all television programming except news, sports, and unedited MPAA rated movies on premium cable channels. *Id.* at 8235. In 1998, the FCC accepted the revised TV Parental Guidelines ("TV program ratings"). *Id.* at 8247.

In the course of negotiating the TV program ratings, industry made other voluntary commitments to the FCC. In exchange for industry's voluntary ratings system to be given a "fair chance" to work in the marketplace, industry specifically pledged to work to:

> educate the public and parents about the V-chip and the TV Parental Guideline System; encourage publishers of TV periodicals, newspapers and journals to include the ratings with their program listings; and evaluate the system.[12]

Industry also pledged that "[i]ndependent, scientific research and evaluation will be undertaken once the V-chip has been in the marketplace." *Id.* at 8279 (App. D, Industry Submission containing July 10,

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[12] *FCC 1998 Report and Order*, 13 FCC Rcd. at 8281 (App. D, "Industry Submission of Aug. 1, 1997," at Attach. 2 to the letter from Jack Valenti, President, MPAA., *et al.*, to William F. Caton, Secretary, FCC (Aug. 1, 1997)).

1997 Agreement on Modifications to the TV Parental Guidelines ¶ 7).

The FCC relied upon industry's representations in accepting the proposed ratings system. *See, e.g.*, *id.* at 8236, 8237. To *Amici*'s knowledge, however, industry has never conducted the promised evaluations.

Despite its theoretical promise, the V-Chip has not proved to be the effective solution many thought it would be, as we now show.

B. The V-Chip Cannot be an Effective Less Restrictive Alternative Unless it Satisfies the Preconditions Necessary to Make it Effective.

1. TV Program Ratings Do Not Consistently and Accurately Reflect Program Content.

The V-Chip can work no better than the TV program ratings system upon which it depends. While the TV ratings system was created to work in conjunction with the V-Chip and inform parents of program content, it is at best an imperfect tool in its current form. The hybrid age-based and content-based ratings system comprises six categories of age-based ratings and four categories of content-based ratings. *FCC 1998 Report and Order*, 13 FCC Rcd. at 8235-36. Some of the categories are tailored to rate programs intended solely for children:

- TV-Y (suitable for all children); and
- TV-Y7 (directed to older children age 7 and above – programs otherwise in this category that contain fantasy violence

that may be "more intense or more combative" receive a special designation, TV-Y7-FV; the "FV" designation does not appear in any other category).

For programs designed for the entire audience, the general categories are:

- TV-G (general audience);
- TV-PG (parental guidance suggested – the program may contain one of more of the following: moderate violence (denoted "V"), some sexual situations ("S"), infrequent coarse language ("L") or some suggestive dialogue ("D"));
- TV-14 (parents strongly cautioned – the program contains intense violence (denoted "V"), intense sexual situations ("S"), strong coarse language ("L") or intensely suggestive dialogue ("D")); and
- TV-MA (mature audiences only – the program contains one or more of the following: graphic violence (denoted "V"), explicit sexual activity ("S") or crude indecent language ("L")). [13]

For those broadcasters that chose to participate in the TV program ratings system, these ratings appear during the first fifteen seconds of most television programs. *FCC 1998 Report and*

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[13] *FCC 1998 Report and Order*, 13 FCC Rcd. at 8236. *See also* CRS V-Chip Report at 5.

Order, 13 FCC Rcd. at 8236. Because the TV ratings system is voluntary, however, networks are under no legal obligation to encode their programming with both the age and content categories, or even to participate in the program at all. In fact, when many industry members first voluntarily implemented the TV ratings program, NBC, although having committed to using the age-based ratings, declined to assign content-based ratings, and did not do so until 2005. *See NBC Adopts Content Ratings*, Broadcasting & Cable (May 2, 2005), *available at* http://www.broadcastingcable.com/article/CA528789.html. The point should be obvious: By its nature, a purely voluntary TV program ratings system cannot be relied upon as an effective less restrictive alternative.

a. Voluntary and Decentralized Implementation of the TV Ratings System Impedes the Achievement of Accurate and Consistent Ratings.

Along with the ratings system, industry established the Board, which was intended to promote the accurate and consistent application of the program ratings to television programming. *FCC 1998 Report and Order*, 13 FCC Rcd. at 8237. The Board has a total of 24 members consisting of a chairman and six "members each from the broadcast television industry, the cable industry, and the program production community." The Board also includes five "non-industry members selected by the

[Board's] Chairman from the advocacy community."[14] The Board's own bylaws, however, restrict it from carrying out the monitoring and enforcement functions that its "oversight" designation might suggest:

> The [Board] has one mandate: *From time to time* to review programs which have received widespread and verifiable criticism about alleged mis-applications of Guidelines. The Board does *not* have the authority to change Guidelines as they are written or to insert new Guidelines.

TV Parental Guidelines Council, Inc., *The Oversight/Monitoring Board: Its Mandate and Its Process* 1 (June 25, 1997) ("*Board Bylaws*") (emphasis added) (on file with author).

The power to assign ratings rests with video programmers and distributors – namely, the broadcast and cable networks – not the Board. Each broadcast network and many of the cable networks maintain internal Standards and Practices Departments that are responsible for assigning ratings to the individual network's programs.[15] Moreover, local broadcasting affiliates can override the rating assigned by a network to a particular

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[14] *Id.* *Amici* AAP, Children Now and PTA are currently three of those five members.

[15] *See, e.g.*, George Dessart, Museum of Broadcast Communications, *Standards and Practices*, http://www.museum.tv/archives/etv/S/htmlS/standardsand/standardsand.htm (last visited May 29, 2008).

program and assign it another rating. *See* CRS V-Chip Report at 3.

Because the power to rate programs rests exclusively with each individual industry member, how each programmer assigns ratings is left entirely to its discretion. The Board plays no role in this ratings process and is merely available as a secondary resort to address after-the-fact consumer complaints about the rating of a specific program. Even if the Board were to decide that a program had been incorrectly rated, however, the network or distributor, *not* the Board, would have the final say on whether to change or maintain the challenged rating. *See Board Bylaws* at Attach. p. 2.

The lack of centralized oversight of the program ratings process means that there is no mechanism for ensuring any consistency or accuracy in the assignment of ratings across numerous networks and distributors – or even for ensuring that programs are rated. This is not to suggest that a centralized ratings body would solve the problem. Given the massive amount of programming involved, that may well be impractical. It does mean, however, that because of the inherent difficulties of achieving accurate and consistent results, the current TV program ratings system cannot be relied upon to serve as an effective less restrictive alternative in protecting children from material their parents believe is inappropriate.

b. Research Indicates That the TV Ratings System Is Neither Consistently nor Accurately Applied, and Significant Numbers of Parents Find The Ratings Unreliable.

Concerns about the lack of uniformity in the application of ratings by networks are corroborated by research. The ratings system would suggest, for example, that a parent could reasonably expect to encounter a lower incidence of crude language in a TV-PG program than in a TV-14 program. One study, however, found that exactly the opposite to be true: When evaluating the content of network programming across four years, researchers found more instances of offensive language in TV-PG programs than in TV-14 programs. Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 4 J. Broad. & Elec. Media 554, 567 (2004). The research further raised the question whether the mere existence of ratings has contributed to "ratings creep," whereby programmers perceive program ratings as giving them greater license to use increasingly objectionable words. *Id.* ("As concerned parents and legislators feared, it seems that warning systems do indeed give broadcasters greater freedom to include vulgarities"). [16]

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[16] *Cf.* Kimberly M. Thompson & Fumie Yokota, *Violence, Sex, and Profanity in Films: Correlation of Movie Ratings With Content*, Medscape General Medicine (July 13, 2004) at 2, *available at* http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pubmed&pubmedid=15520625 (finding that ratings

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Parents, too, have mixed views on the TV program ratings' accuracy. Of those parents who have used the TV ratings, only a little more than half (52%) report that the shows are rated accurately. Victoria Rideout, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004), *available at* http://www.kff.org/entmedia/upload/Parents-Media-and-Public-Policy-A-Kaiser-Family-Foundation-Survey-Report.pdf. Thirty-nine percent of parents report that most shows are *not* rated accurately. *Id.*

In fact, inaccurate TV program ratings surprised parents viewing the 2002 and 2003 Billboard Music Awards programs that triggered the instant proceeding. Given the TV-PG(D) rating assigned to those live programs – a rating that supposedly shields viewers from the "F-Word" – not even an informed V-Chip user could have protected children from the objectionable comments aired during these broadcasts.[17] Parents therefore have

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creep occurred over the last decade, and that today's movies contain significantly more violence, sexual content, and profanity on average than movies of the same age-based rating (*e.g.*, G, PG, PG-13, R) a decade ago); Lucille Jenkins, *et al.*, "*An Evaluation of the Motion Picture Association of America's Treatment of Violence in PG-, PG-13-, and R-Rated Films*," Pediatrics (May 2005) at e512-13 (finding that MPAA ratings do not predict the frequency of violence that occurs in films, indicating ratings creep).

[17] *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum of Opinion and Order, 21 FCC Rcd. 13299, 13319-20 (2006) ("*2006 Complaint Order*"); *see*

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good reasons to believe the networks are not applying the TV program ratings accurately.[18]

Parents' dissatisfaction with the TV program ratings system to assist them in filtering program content is also reflected in their views about the continuing need for additional government regulation. According to the most recent Kaiser survey, two-thirds of parents (66%) say that they support government regulations "to limit the amount of sex and violence on TV during the early evening hours." Victoria Rideout, *Parents, Children & Media: A Kaiser Family Foundation Survey* 3 (2007) ("*2007 Kaiser Survey*").

c. The TV Program Ratings System Does Not Rate Commercials.

Another limitation of the TV program ratings system is that it does not rate commercials. *See FCC 1998 Report and Order*, 13 FCC Rcd. at 8242. This limitation is no small matter. A Federal Trade Commission report on marketing of violent

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also id. at 13305-06 (describing Nielsen Media Research indicating that during the 2003 Billboard Music Awards broadcast, approximately twenty-three percent of viewers were under 18 and eleven percent of viewers were between the ages of 2 and 11).

[18] *See id.* at 13306, n.47 (Fox's policy was to rate any programming containing the "F-Word" TV-MA— indicating that the program was for a mature adult audience and therefore possibly unsuitable for children under 17— although that was *not* the rating that Fox actually applied to the Billboard Music Awards programs.)

entertainment found that inappropriate advertising on broadcast television is in fact reaching children. The report found that TV ads are a primary medium for promoting new movies and that studios' advertising campaigns (for movies rated R for violence) at least in part targeted a TV-viewing audience that included people aged 12 and above. [19]

Unrated advertising is an issue for parents. In focus group sessions, many parents were at least as concerned about the child-inappropriate content of television advertising as they were about the content of television shows. *2007 Kaiser Survey* at 7. Parents cannot avoid objectionable content, however, when it unexpectedly appears in unrated commercials. *Id.* The TV program ratings system is therefore not an alternative at all for filtering content in commercials.

2. Parents are Not Aware of the Availability of the V-Chip.

The V-Chip is not self-effectuating. To perform its function, the V-Chip must be activated and programmed by parents. To activate the V-Chip, parents must successfully complete several steps: after entering a password, they access a series of on-screen menus that permit them to select which

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[19] Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Sept. 2000) at 14, *available at* http://www.ftc.gov/reports/violence/vioreport.pdf; *Cf. id.* at iv, 17 (finding that movie promoters routinely target children under 17 and make "little effort" to restrict access to violent material).

ratings will be acceptable and unacceptable for viewing. *See, e.g.*, Ctr. for Media Educ. & Henry J. Kaiser Family Foundation, *A Parent's Guide to the TV Ratings and V-Chip* (1999), *available at* http://i.ncta.com/ncta_com/PDFs/VChip%202000%20Brochure.pdf. Despite the facial appeal of blocking technology, the past decade of V-Chip deployment has revealed definite limitations in this technology and its companion rating system.

For example, roughly a decade after its adoption, use and awareness of V-Chip capability remain low. According to the *2007 Kaiser Survey* (at 10), only sixteen percent of all parents report ever having used the V-Chip. Yet although only sixteen percent of parents report using the V-Chip, two-thirds of parents report that they are "very" concerned that children are exposed to too much inappropriate content in the media. *Id.* at 1, 3. Nearly a quarter (23%) of all parents believe that the media has "a lot" of influence on their children. *Id.* at 7. Moreover, a plurality of those parents concerned about children's exposure to media content continues to point to television as the medium that concerns them the most (32%). *Id* at 3.

The availability of TV sets with V-Chips notwithstanding, many families simply do not realize that they have V-Chip capabilities in their sets. Amy Jordan & Emory Woodard, Annenberg Pub. Policy Ctr. of Univ. of Pa., *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/20030402_Children_and_TV_Roundtable/20030402_ParentsVchip_report.pdf ("*2003*

Annenberg Study"). In fact, in the *2003 Annenberg Study*, more than one-third of families with V-Chip equipped sets (35%) mistakenly reported that their TV set was not equipped for blocking programs based on the ratings system. *Id.* A significant absence of parental V-Chip awareness was also evident in the more recent *2007 Kaiser Survey*. A high proportion of parents (82%) report having purchased a new TV set since January 2000 (the date of implementation for the FCC mandate requiring TV sets to be equipped with a V-Chip). *Id.* at 9. Although these parents therefore can be presumed to have a V-Chip-equipped set, more than half of them (57%) were not aware that their TV set has a V-Chip. *Id.*

Research indicates that accelerating the development of parental awareness programs could increase use of the V-Chip. *See, e.g.*, CRS V-Chip Report at 9. This could be accomplished by a variety of means, including "public service announcements on television, educational materials on the FCC website, and possibly public service advertisements in print media." *Id.* Such measures, however, require the full and active participation of industry. Industry's commitment to publicizing the V-Chip and TV program ratings, however, has been sporadic and uneven. In fact, the V-Chip and TV program ratings public education effort faces an inherent obstacle because industry, which is in the best position to educate, faces a conflict of interest: Blocking technology can reduce the number of viewers of a program, and ratings can highlight content that is inappropriate for children, thereby potentially increasing the amount of programming parents choose to block.

3. Operation and Use of the V-Chip and TV Program Ratings System are Not Easily Understood by Most Parents.

Using the V-Chip is complex and frustrating for many parents. Even when parents are aware of its availability, V-Chip use is hindered by users experiencing difficulty with its operation. The *2003 Annenberg Study* (at 3) reported that many families found the V-Chip to be "hidden and difficult to program." This study also found that the multi-step process of programming the V-Chip proved confusing and frustrating: "No fewer than five menus must be navigated and parents must move quickly or programming menus disappear." *Id.* When a follow-up interview study asked participants to program the V-Chip to block TV-MA programs with violence, only twenty-seven percent of mothers felt that they could do it. *Id.* at 4.

For the V-Chip to serve its purpose, parents must also be thoroughly familiar with the TV program ratings system's shorthand symbols for the age-based and content-based codes. Thus, even if the TV ratings system could be relied upon to consistently and accurately inform parents of program content, the system cannot be effective if most parents do not understand it well enough to use it. Research indicates that although most parents have heard of the TV ratings, most do not understand what the ratings mean. *2007 Kaiser Survey* at 8. Among parents with children aged 2-6, less than one-third (30%) of parents could name any of the ratings that correspond to programming suitable for their children (TV-G, TV-Y and TV-Y7). The rating TV-Y7, for example, was named by just

eleven percent of the parents with children in this age category. *Id.*

Even fewer parents understand the content-based descriptors than the age-based ratings. Roughly half (51%) understood that "V" indicates violence, thirty-six percent knew that "S" stands for sex, and only two percent knew that "D" indicates suggestive dialogue. *Id.* at 9. Among all parents, only eleven percent knew that the "FV" rating denoted content displaying fantasy violence. *Id.* at 8. All the more troubling, nine percent of parents mistakenly believed that "FV" assured them that they would be watching a program suitable for "family viewing." *2007 Kaiser Survey* at 8.

4. The V-Chip is Constrained by Technological Limitations.

V-Chip technology is of no value if the TV sets parents use are not equipped with the necessary V-Chip. And many are not. According to the *2007 Kaiser Survey*, eighteen percent of all parents do not have a V-Chip-equipped TV set. *Id.* at 9.[20]

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[20] There also is an unknown, but likely substantial, number of households which, although they may have a V-Chip-equipped TV sets, also have a number of legacy non-V-Chip TV sets in children's bedrooms. The *2003 Annenberg Study* (at 4) reported that with an average of four TV sets per family (among study participants), children who are "truly motivated" to see blocked shows can "pretty easily" find it on a non-V-Chip-equipped TV set in the home. *See also* Annenberg Pub. Policy Ctr. of Univ. of Pa., *Television & Children's Media Policy: Where Do We Go From Here?* 4 (Feb. 28, 2003), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/20030402_Children_and_T

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Moreover, even among those households with V-Chip-equipped TV sets, many of those TV sets do not have the updated V-Chip software now mandated by the FCC. Recognizing that the TV ratings system could be improved over time, in 2004 the FCC required that all digital televisions sold in the United States after March 15, 2006, contain an upgraded V-Chip. *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Report and Order, 19 FCC Rcd. 18279 (2004); 47 C.F.R. § 15.120(d)(2). The updated V-Chip technology contains software that enables TV sets to "be able to respond to changes in the content advisory rating system." *Id.*

In theory, the transition to digital television should afford industry and other stakeholders an opportunity to improve the development and deployment of the V-Chip and the TV ratings system.[21] Such an opportunity will never be

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V_Roundtable/20030402ChildrensMediaPolicyConference_transcript.pdf (statement of Amy Jordan, Senior Researcher). Concerns over the ubiquitous presence of legacy TV sets are heightened by the knowledge that many of these sets are in children's bedrooms. *See* Donald F. Roberts, Ph.D., *et al.*, Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (Mar. 2005) (cited in *2006 Complaint Order*, 21 FCC Rcd. at 13319) (finding that 68% of children aged 8 to 18 have a TV set in their bedrooms, and nearly half of those sets rely on broadcast solely because they lack cable or satellite connections).

[21] The Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, § 3002, Title III, 120 Stat. 21-22 (2006) (to be codified at 47 U.S.C. § 309 note), requires

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realized, however, unless television sets are in widespread compliance with the FCC's V-Chip upgrade requirements. Last year, for example, the FCC investigated seven television manufacturers and discovered that several manufacturers were shipping TV sets that lacked the required upgraded V-Chip. *See* News Release, FCC, "Enforcement Bureau Adopts DTV V-Chip Consent Decrees Totaling Over 3.4 Million" (Apr. 10, 2008), *available at* http://www.fcc.gov/eb/News_Releases/DOC-281451A1.html (last visited May 28, 2008). The FCC entered into consent agreements totaling over $3.4 million with seven separate manufacturers to resolve the investigations into possible violations. *See, e.g.*, *Funai Corp.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd. 19663 (2007).

C. The Unresolved Challenges of the V-Chip and the TV Ratings.

The court of appeals was mistaken about the ability of "advanced technologies," and the V-Chip in particular, to empower parents to protect their children from inappropriate media. The court of appeals' confidence is especially misplaced given the significant and ongoing shortcomings of the V-Chip and its companion TV program ratings that have

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broadcasters to cease analog broadcasting and simulcast 100% of their programming on their digital channel by February 17, 2009. *See* U.S. Gen. Accounting Office, GAO-08-510, *Digital Television Transition: Majority of Broadcasters Are Prepared for the DTV Transition, but Some Technical and Coordination Issues Remain* (2008); *see also* CRS V-Chip at 13 n.8.

subsequently become apparent. Research indicates that low V-Chip usage reflects in no small part the fact that many parents are still not aware that this tool even exists. And if they are aware, they often do not know how to program and use the V-Chip or how to use the complex, confusing and often inaccurate TV ratings.

The V-Chip and its TV ratings system were welcomed with great expectation. The V-Chip was hailed as a modern tool to empower parents to protect their children from media content they find inappropriate. But for any tool to be useful, it must actually perform its task in a consistent and reliable manner, it must be known to be available, it must be easy to operate, and it must work reasonably well.

With more than half of parents unaware that they have a V-Chip-equipped TV set, with many parents reporting the difficulties of using the V-Chip and the TV ratings, and with reports about the lack of reliability and accuracy of the TV ratings, the V-Chip is not yet an effective tool for its intended purpose. The promise of the V-Chip to protect children from programming that is inappropriate for them remains an unfulfilled promise.

CONCLUSION

The Court need not, and should not, reach any First Amendment issues to decide this case. If the Court nevertheless does reach those issues, it should not disturb *Red Lion*. Should the Court find occasion to reach the issue of less restrictive alternatives, it

should find that the V-Chip and its TV program ratings system do not constitute an effective less restrictive alternative.

Respectfully submitted,

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